NOMEZAM APANDY ABU HASSAN A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
SURIYADI HALIM OMAR JCA
HASAN LAH JCA
AHMAD MAAROP JCA
[CRIMINAL APPEAL NO: M-05-108-2007]
6 DECEMBER 2010 C

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Intention or knowledge - Whether proved - Whether accused's intention of causing bodily injury could be gathered from his act of pouring petrol on deceased and using burning newspaper to set deceased ablaze - Whether accused's acts fatal and carried knowledge of consequences - Mens rea - Whether established* D

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Conviction based on confession made by murder accused to magistrate under Criminal Procedure Code, s. 115 - Whether voluntariness proved - Incriminating parts of confession, whether corroborated* E

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Conviction based on evidence of witness - Whether witness an accomplice - Whether evidence required corroboration - Whether independent evidence connected accused with crime - Whether there was plausible ground to reject witness's evidence - Whether there was sufficient corroboration from other witnesses - Whether existence of motive to kill amounted to corroborative evidence* F

CRIMINAL PROCEDURE: *Mens rea - Inference from facts established - Whether mens rea for murder may be gathered from indirect evidence by reference to facts and circumstances of the case - Penal Code, s. 300* G

EVIDENCE: *Confession - Confession made by murder accused to magistrate under Criminal Procedure Code s. 115 - Whether voluntariness proved - Incriminating parts of confession, whether corroborated* H

I

A ***EVIDENCE:*** *Dying declaration - Statements made by deceased - Whether attracted application of s. 32(1)(a) Evidence Act 1950 - Whether statements made by deceased to father and brother relevant and admissible*

The appellant ("Nomezam") had poured petrol on one Luqman, who was in a car with his hands tied to the steering wheel, and had set him ablaze causing severe burns which caused his death. Nomezam was charged with the murder of Luqman. According to the sole eye-witness (SP3), Nomezam had seen his ex-girlfriend (SP2) alighting from Luqman's car. Then, with SP3 as the pillion rider, Nomezam rode motorcycle no. MAV7993 following the car until a traffic light junction where Nomezam stopped the motorcycle, jumped into Luqman's car and set beside Luqman armed with a sickle. Nomezam instructed SP3 to follow the car on his motorcycle. Later, the car stopped and Nomezam instructed SP3 to buy some petrol. SP3 bought the petrol in an empty coca-cola bottle and placed it in the motorcycle basket. Nomezam then tied Luqman's hands with a scarf and drove the car to a spot at Jalan Bukit Lintang followed by SP3 on the motorcycle. There Nomezam tied Luqman's hands to the steering wheel using the scarf. Nomezam then took the petrol bottle, poured the petrol over Luqman's body and threw a burning newspaper at Luqman, setting the latter ablaze. SP3 who was sitting on the motorcycle witnessed the whole incident. Around that time, SP4 who was in a bus spotted the car on fire and saw Luqman with his hand tied asking for help by raising his hands. SP4 telephoned the ambulance and police. The police patrol car driven by Kpl. Sujaee (SP6) arrived at the scene and sent Luqman to the hospital. On the way to the Hospital, Luqman mentioned the motorcycle no. MAV 7993 to SP6. Luqman's father (SP5) met Luqman at the Hospital where Luqman informed SP5 that he was robbed at the traffic light and thereafter taken to Bukit Lintang. Later, while being taken to the Intensive Care Unit (ICU), Luqman informed his brother (SP11) that he had been robbed. Luqman also informed SP11 he indentified MAV 7993 as the number of the motorcycle involved. Luqman later succumbed to the extensive burn injuries covering approximately 50% of the surface of his body. Nomezam was arrested and he made a confession to SP16 (a magistrate at the Malacca Magistrate's Court) who recorded it as P26. At the close of the prosecution's

B C D E F G H I

case the learned trial judge found that the prosecution had proved a *prima facie* case of murder against Nomezam. In his defence, Nomezam claimed that it was SP3 who had set Luqman ablaze. The High Court found Nomezam guilty of the charge, convicted him and sentenced him to death. Hence this appeal. Learned defence counsel contended that P26 was inadmissible in evidence and that without P26, the prosecution had no leg to stand on as all that the court had before it was only SP3's evidence against that of Nomezam's. Learned counsel contended that there was no independent evidence to prove that Nomezam was more guilty that SP3.

Held (dismissing the appeal and affirming the conviction and sentence)

Per Ahmad Maarop JCA delivering the judgment of the court:

(1) There was nothing in the judgment of the learned trial judge to show that he had taken into account P26 in arriving at his decision that Nomezam was guilty of the murder charge. Without P26, the prosecution's case rested substantially on SP3's evidence. Since SP3 had no prior knowledge that Nomezam intended to commit the offence charged, SP3 was not an accomplice or accessory after the fact. His evidence was thus to be treated as that of an ordinary witness requiring no corroboration. (para 12)

(2) Nevertheless, despite his ruling that SP3's evidence required no corroboration, the learned tried judge held alternatively, that there was sufficient corroboration of SP3's evidence. SP11's evidence on what Luqman had told him was rightly admitted in evidence as a dying declaration under s. 32 (1)(a) of the Evidence 1950. This statement by Luqman substantially corroborated SP3's evidence. (para 17)

(3) Another item of corroborating evidence was motive. Although motive is not a necessary ingredient to be established in the offence of murder, it would if shown, tend to support the case against the accused so charged. Here it was jealousy. Jealousy of an ex-boyfriend who felt that he was jilted. Jealousy is a powerful motive. This evidence of motive lent credence to SP3's evidence against Nomezam. (para 22)

A **(4)** The death of Luqman and that it had been caused by Nomezam had been proven. As for *mens rea* to establish the offence of murder, there were extensive burn injuries covering approximately 50% of the surface of Luqman's body which was sufficient in the ordinary course of nature to cause the
B death. Hence, Nomezam's acts which caused Luqman's death were done with the intention of causing bodily injury to Luqman and that the bodily injury intended was sufficient in the ordinary course of nature to cause death. All requisite elements of the offence of murder were proven by the
C prosecution. (paras 26 & 27)

(5) P26 was recorded by SP16 under s. 115 of the Criminal Procedure Code. SP16 testified that she was satisfied that Nomezam made the confession voluntarily. The prosecution
D had proved beyond reasonable doubt that the confession in P26 was made by Nomezam voluntarily. Thus, the learned trial judge was right in admitting P26. (paras 29-31)

(6) Once the court is satisfied that the confession is voluntarily made and that it is true, the accused may be convicted solely
E on the strength of his confession even when retracted. Nevertheless, what was said by Nomezam in P26 was substantially corroborated by SP3's evidence and to a certain extent by SP2's, SP6's and SP11's evidence. The confession
F was true. (para 40)

(7) The appellate court will be slow to interfere with the findings of the trial judge as primary trier of facts. In order to reverse the decision on such matters, the appellate court must not merely entertain doubt whether the trial judge's decision was
G right, but be convinced that it was wrong. On the present facts, the trial judge was right in finding that the prosecution had proved a case of murder beyond reasonable doubt. (para 43)

H ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu ('Nomezam') telah mencurah petrol ke atas seorang Luqman, yang berada dalam sebuah kereta dengan tangan terikat kepada stering kereta, dan kemudian membakarnya sehingga
I menyebabkan kecederaan parah dan kematian Luqman. Berikutnya

Norezam dituduh membunuh Luqman. Menurut saksi tunggal yang melihat kejadian (SP3), Nomezam telah melihat bekas teman wanitanya (SP2) keluar dari kereta Luqman. Berikutnya, dengan menunggang motosikal no. MAV 7993 yang dibonceng oleh SP3, Nomezam mengekori kereta sehingga ke satu simpang lampu isyarat di mana Nomezam memberhentikan motosikal, menerjah ke dalam kereta Luqman dan duduk di sisi Luqman dengan bersenjatakan sebilah sabit. Nomezam juga mengarahkan SP3 supaya mengikuti kereta dengan motosikalnya. Kereta kemudian berhenti di mana Nomezam mengarahkan SP3 untuk membeli sedikit petrol. SP3 membawa petrol dalam satu botol coca-cola dan meletakkannya di dalam raga motosikal. Nomezam kemudian mengikat tangan Luqman dengan kain selendang dan, dengan diikuti oleh SP3 dengan motosikal, memandu kereta ke suatu tempat di Jalan Bukit Lintang. Di situ, dengan menggunakan kain selendang, Nomezam mengikat tangan Luqman kepada stering kereta. Nomezam kemudian mengambil botol yang berisi petrol, mencurahkan petrol ke badan Luqman dan mencampakkan cebisan kertas suratkhabar yang terbakar kepada Luqman, sekaligus membakarnya. SP3, yang duduk atas motosikal, melihat segala-galanya. Pada lebih kurang waktu itu, SP4, yang berada di dalam sebuah bas berdekatan, melihat kereta yang sedang terbakar dan juga Luqman dengan tangan terikat meminta tolong dengan mengangkat tangannya. SP4 menelefon ambulan dan juga polis. Berikutnya, kereta peronda polis yang dipandu oleh Kpl. Sujaee (SP6) sampai ke tempat kejadian dan menghantar Luqman ke hospital. Semasa dalam perjalanan ke hospital, Luqman menyebut motosikal no. MAV 7993 kepada SP6. Bapa Luqman (SP5) juga menemui Luqman di hospital di mana Luqman memberitahunya bahawa beliau telah dirompak di simpang lampu isyarat dan kemudian dibawa ke Bukit Lintang. Kemudian dari itu, sewaktu dibawa ke Pusat Rawatan Rapi (ICU), Luqman memberitahu abangnya (SP11) bahawa beliau telah dirompak. Luqman juga memberitahu SP11 beliau mengingati MAV 7993 sebagai motosikal yang terlibat. Luqman kemudian meninggal dunia kerana lebih kurang 50% dari kulit badannya melecur akibat dari kebakaran. Nomezam telah ditangkap dan beliau membuat pengakuan di hadapan SP16 (seorang Majistret di Mahkamah Majistret Melaka) yang merekodkannya sebagai P26. Di akhir kes pendakwaan, yang arif hakim bicara mendapati bahawa pendakwaan telah membuktikan suatu kes bunuh terhadap Nomezam. Dalam pembelaannya, Nomezam mendakwa bahawa

A yang membakar Luqman adalah SP3 dan bukan dirinya. Mahkamah Tinggi mendapati Nomezam bersalah seperti yang dituduh dan sekaligus mensabit dan menjatuhkan hukuman mati ke atasnya. Nomezam merayu dan berhujah bahawa P26 adalah tidak boleh diterima-masuk sebagai keterangan dan bahawa, tanpa P26,
B kes pendakwaan akan runtuh kerana apa yang mahkamah ada hanyalah keterangan SP3 menentangi keterangan Nomezam. Peguam bijaksana juga berhujah bahawa tidak terdapat keterangan bebas bagi membuktikan bahawa Nomezam lebih bersalah daripada SP3.

C

Diputuskan (menolak rayuan dan mengesahkan sabitan dan hukuman)

Oleh Ahmad Maarop HMR menyampaikan penghakiman mahkamah:

D

(1) Tiada apa pun dalam penghakiman yang arif hakim bicara yang menunjukkan bahawa beliau telah mengambil kira P26 dalam mencapai keputusannya bahawa Nomezam bersalah atas pertuduhan bunuh. Tanpa P26, kes pendakwaan secara substantifnya berdiri atas keterangan SP3. Oleh kerana SP3
E tiada pengetahuan terdahulu bahawa Nomezam berniat untuk melakukan kesalahan yang dituduh, maka SP3 bukan seorang rakan sejenayah atau accessory selepas fakta. Keterangannya dengan itu hendaklah dilihat sebagai keterangan seorang saksi biasa yang tidak memerlukan sebarang sokongan.

F

(2) Bagaimanapun, walaupun setelah memutuskan bahawa keterangan SP3 tidak memerlukan sokongan, yang arif hakim bicara memutuskan, secara alternatifnya, bahawa terdapat keterangan menyokong yang mencukupi terhadap keterangan
G SP3. Keterangan SP11 tentang apa yang diberitahu Luqman kepadanya telah diterima-masuk dengan betulnya sebagai keterangan saat kematian di bawah s. 32(1)(a) Akta Keterangan 1950. Kenyataan oleh Luqman menyokong kuat keterangan SP3.

H

(3) Satu lagi keterangan menyokong adalah mengenai motif. Walaupun motif bukan satu ingredien perlu yang harus dibuktikan dalam kesalahan bunuh, jika dibuktikan, ia boleh menyokong kes yang dihadapkan ke atas tertuduh. Di sini,
I motifnya adalah cemburu, iaitu kecemburuan seorang bekas

teman lelaki yang merasakan dirinya ditinggalkan. Cemburu merupakan satu motif yang kuat. Keterangan motif ini menyokong keterangan SP3 terhadap Nomezam.

(4) Kematian Luqman dan bahawa ianya dilakukan oleh Nomezam telah dibuktikan. Berhubung *mens rea* bagi mengasaskan kes bunuh, terdapat kecederaan-kecederaan kebakaran yang meliputi lebih kurang 50% kulit badan Luqman, yang mana adalah mencukupi dalam perjalanan alamiah biasa untuk menyebabkan kematian. Oleh itu, perbuatan Nomezam yang menyebabkan kematian Luqman adalah dilakukan dengan niat untuk menyebabkan kecederaan badaniah kepada Luqman dan bahawa kecederaan badaniah yang diniatkan tersebut adalah memadai dalam perjalanan alamiah biasa untuk menyebabkan kematian. Semua elemen-elemen perlu bagi kesalahan bunuh telah dibuktikan oleh pendakwaan.

(5) P26 telah direkodkan oleh SP16 di bawah s. 115 Kanun Tatacara Jenayah. SP16 memberi keterangan bahawa beliau berpuashati bahawa Nomezam membuat pengakuan dengan sukarela. Pendakwaan telah membuktikan di luar keraguan munasabah bahawa pengakuan di dalam P26 telah dibuat oleh Nomezam dengan sukarela. Hakim bicara dengan itu betul dalam menerima-masuk P26.

(6) Sebaik mahkamah berpuashati bahawa pengakuan dibuat secara sukarela dan bahawa ia adalah benar, tertuduh boleh disabitkan semata-mata atas pengakuannya walaupun ia ditarik semula. Walau bagaimanapun, apa yang dikatakan oleh Nomezam dalam P26 telah kemudiannya disokong oleh keterangan SP3, dan ke suatu tahap oleh keterangan-keterangan SP2, SP6 dan SP11. Pengakuan juga adalah benar.

(7) Mahkamah di peringkat rayuan amat berhati-hati untuk campur tangan dalam dapatan-dapatan hakim bicara sebagai pengadil utama fakta. Untuk mengakas keputusannya atas perkara-perkara itu, mahkamah rayuan bukan sahaja perlu merasa ragu sama ada keputusan hakim bicara itu betul, tetapi harus yakin bahawa keputusannya adalah salah. Berdasarkan fakta-fakta kes semasa, hakim bicara betul dalam mendapati pendakwaan telah membuktikan suatu kes bunuh di luar keraguan munasabah.

Case(s) referred to:

Ahmad Najib Aris v. PP [2009] 2 CLJ 800 FC ***(refd)***
Andy Bagindah v. PP [2000] 3 CLJ 289 CA ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 CLJ 10; [1983] CLJ (Rep) 101 FC ***(refd)***
Harcharan Singh & Anor v. PP [2005] 1 CLJ 11 CA ***(refd)***
Herchun Singh & Ors v. PP [1969] 1 LNS 52 FC ***(refd)***
Jamaluddin Md Kassim v. PP [2010] 5 CLJ 928 CA ***(refd)***
Juraimi Hussin v. PP [1998] 2 CLJ 383 CA ***(refd)***
Kuan Ted Fatt v. PP [1985] 1 CLJ 150; [1985] CLJ (Rep) 174 FC ***(refd)***
Mohamed Isa Leman v. PP [1938] 1 LNS 41 HC ***(refd)***
Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***
Omwasi v. Mahendran Singh AIR [1998] SC 249 ***(refd)***
Osman & Anor v. PP [1967] 1 LNS 117 PC ***(refd)***
Perimal v. State [1986] Cr LJ 220 ***(refd)***
PP lwn. KK [2007] 6 CLJ 367 HC ***(refd)***
PP v. Raman I, Raman II, Ayappan [1939] 1 LNS 74 HC ***(refd)***
R v. Baskerville [1916] 2 KB 658 ***(refd)***
Re Soo Leot [1955] 1 LNS 127 HC ***(refd)***
Sathiadas v. PP [1970] 1 LNS 142 HC ***(refd)***
Sinaraju v. PP [1960] 1 LNS 126 HC ***(refd)***
State of Uttar Pradesh v. Devendra Singh, AIR (2004) Supreme Court 3690 ***(refd)***
Thavanathan Balasubramaniam v. PP [1997] 3 CLJ 150 FC ***(refd)***
Yaacob v. PP [1965] 1 LNS 203 FC ***(refd)***
Yap Sow Keong And Another v. PP [1947] 1 LNS 121 HC ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 115(3), 420
Evidence Act 1950, s. 32(1)(a)

For the appellant - Datuk N Sivananthan (Tina Ong with him); M/s Sivananthan
For the respondant - Tetralina Ahmad Fauzi DPP

[Appeal from High Court, Melaka; Criminal Trial No: MT1-45-05-2003]

[Editor's note: For the High Court judgment, please see PP v. Nomezam Apandy Abu Hassan (No 2) [2008] 7 CLJ 168]

Reported by Amutha Suppayah

JUDGMENT

Ahmad Maarop JCA:

Introduction

[1] In this case the appellant ("Nomezam") poured petrol on one Noor Luqman bin Mahyuddin ("Luqman") (who was then in motorcar no. WAG 5824 with his hands tied to the steering wheel), and then using a burning newspaper, set the latter ablaze causing severe burns which caused his death. Nomezam was charged with the murder of Luqman on 23 June 2003 at about 3 am by the side of the road at Batu 7, Bukit Lintang, Tiang Dua, in the District of Melaka Tengah, Malacca. The High court found Nomezam guilty of the charge, convicted him and sentenced him to death. He appealed to this court.

The Prosecution's Case

[2] The narrative of the events leading to the final act of Nomezam setting Luqman ablaze was provided by the testimony of the sole eye-witness – Amran bin Daud (SP3). The substance of SP3's evidence is as follows. On 22 June 2003 at about 10pm, SP3 was playing the game of "Ting Tong" with his friends including Nomezam in the shop of one Hj Omar at Kg. Sri Minyak, Umbai, Malacca. Nomezam then left the shop on a motorcycle no. MAR 1307. SP3 and his other friends remained in the shop. At about 10.45pm, Nomezam came back to the shop. Nomezam invited SP3 to go to Malacca town. SP3 did not go. Instead, SP3 and his other friends went to a Warung at Anjung Batu to have their drinks. Some 20 minutes later, SP3 received a telephone call from Nomezam requesting him to come urgently to the Umbai Esso Petrol Station. SP3 proceeded to the said petrol station on motorcycle no. MAV 7993 and met Nomezam there. Nomezam, who had parked his own motorcycle at the said petrol station, persuaded SP3 to carry him as a pillion rider. They proceeded to Jalan Mata Kuching where Nomezam made a call using a public telephone in front of the KFC building. After about 5 minutes Nomezam took over the motorcycle with SP3 as pillion rider. They proceeded to the Mobil Petrol Station at Jalan Mata Kuching where Nomezam made another telephone call. From that petrol station they proceeded to the Hang Tuah Mall and Nomezam stopped the motorcycle at a public telephone booth

A behind the Ocean Supermarket where Nomezam made the third telephone call. From there, with SP3 as the pillion rider, Nomezam rode the motorcycle back to Jalan Mata Kuching. At about 12.45am 23 June 2003, they arrived near the house of one Farrah Bte Zakariah (SP2). SP2 was Nomezam's ex-girlfriend. From a B distance of about 30 feet, SP3 and Nomezam saw SP2 alighting from motorcar no. WAG 5824. Luqman was the driver of that car. Nomezam told SP3 "Itu dia". Then, with SP3 as the pillion rider, Nomezam rode the motorcycle following the car. They followed the car until the traffic light junction at the Straits Meridian Hotel C Malacca, where Nomezam rode the motorcycle closer to the left side of the car and then stopped the motorcycle, at the same time telling SP3 "Kau pegang handle motosikal kuat-kuat". As Nomezam was about to alight from the motorcycle, he saw a police patrol car. Nomezam decided not to alight from the D motorcycle. Nomezam then continued to follow the car until the traffic light junction at Jalan Tun Fatimah near the stadium. There, Nomezam closed in and rode to the left side of the car. Then, Nomezam stopped the motorcycle, jumped from it and armed with a sickle, he entered the car and slid into the front passenger's seat E next to Luqman who was then driving the car. Nomezam then wound down the screen of the left front door and told SP3 to follow the car. Riding the motorcycle, SP3 followed the car to the Bukit Katil BP Petrol Station, where Nomezam alighted from the car and gave SP3 RM5. When asked by SP3 what was the money F for, Nomezam told SP3 to use the money to buy petrol. Since the Bukit Katil Petrol Station was closed at that time, SP3 asked Nomezam where to buy the petrol. Nomezam told SP3 to buy it at the Semabok Esso Petrol Station. SP3 rode to the Semabok Esso Petrol station followed by Nomezam in the car driven by G Luqman. At that petrol station, SP3 bought RM2 worth of petrol which was filled in an empty coca-cola bottle which SP3 found from the garbage bin. SP3 placed the bottle of petrol in the motorcycle basket. SP3 thought that the petrol was to be used as spare petrol for the motorcycle.

H

[3] From the Semabok Esso Station, Nomezam who was still in the car (which was driven by Luqman), led SP3 who was riding the motorcycle to Jalan Bukit Katil/Duyong. There, the car stopped near an abandoned house. Nomezam alighted from the I car, took the car ignition key and opened the boot of the car.

Nomezam took out a female scarf (P16A) from the boot. After tying Luqman's hands using the scarf, Nomezam ordered Luqman to move over to the front passenger seat of the car. Nomezam told SP3 to follow the car on the motorcycle. Nomezam then drove the car back to the Bukit Katil B.P Station where he told SP3 to park the motorcycle. Then, as ordered by Nomezam, SP3 took the bottle of petrol from the motorcycle basket, got into the car and sat behind the front passenger seat. SP3 was not aware of Nomezam's intention. Nomezam then drove the car to the Mata Kuching Shell Station. Arriving there at about 2am, Nomezam asked Luqman, "Kau keluar pukul berapa? Kenapa kau balik?". Luqman replied, "Aku keluar pukul 11.30 malam dan emak Farah telefon". Nomezam then took possession of Luqman's handphone and drove the car back to the Bukit Katil B.P Station where SP3's motorcycle was left earlier.

[4] On arrival at the Bukit Katil B.P Petrol Station, as directed by Nomezam, SP3 alighted from the car, took the petrol bottle to his motorcycle and followed the car to Jalan Duyong, Jalan Bukit Lintang and Jalan Paya Dalam, where Nomezam eventually stopped the car. There, Nomezam relieved himself by the road side, and then told SP3, "buat dekat selekoh Jalan Bukit Lintang". According to SP3, he did not understand what Nomezam meant by those words. From there Nomezam drove the car to a spot at Jalan Bukit Lintang followed by SP3 on the motorcycle. Nomezam stopped the car there and asked SP3 for the petrol. SP3 said, "di dalam bakul motosikal saya". Nomezam ordered Luqman to move to the driver's seat facing the steering wheel, after which Nomezam tied Luqman's hands to the steering wheel using the scarf. Nomezam then took the petrol bottle and poured the petrol over Luqman's body. Next, Nomezam took a piece of newspaper from the boot of the car and lighted it using a lighter. Nomezam then threw the burning newspaper at Luqman, setting the latter ablaze. SP3 who was sitting on the motorcycle witnessed the whole incident. A moment later, Nomezam asked SP3 to leave the scene. SP3 rode the motorcycle with Nomezam as the pillion rider. On the way to the Umbai Esso Station, Nomezam told SP3, "Habis bulu tangan aku terbakar". Nomezam also warned SP3, "jangan beritahu sesiapa". On arrival at the Umbai Esso Station, with his sickle Nomezam alighted from the motorcycle ridden by SP3 and proceeded to his own motorcycle which was left there. SP3 then went home.

[5] On 23 June 2003, at about 3.15am, Shukor Hj Talib (SP4) was in a bus with 39 other passengers. He was returning to his house at Jalan Tiang Dua, Bukit Lintang, Malacca from a trip in Kelantan. When the bus reached somewhere near his house, SP4 saw a Proton car on fire. He asked the bus driver to direct the bus spot light on the burning car, and he then noticed a man outside the car with his hands tied. That man was asking for help by raising his hands. The bus stopped. SP4 took the man (identified as Luqman) into the bus. SP4 noticed burn injuries on Luqman's body and hands. At that time Luqman could still talk. Luqman told SP4 that he was the son of the Deputy Director of the Henry Gurney School, Telok Mas, Malacca. SP4 telephoned the ambulance, the Malacca Central Police Patrol Car and Luqman's father. The police patrol car driven by Kpl. Sujaee b. Hassan (SP6) arrived first. SP6 sent Luqman to the Emergency Ward of the Malacca Hospital. On the way to the Hospital, Luqman mentioned the motorcycle no. MAV 7993 to SP6. The information about the motorcycle number was relayed by SP6 to the Police District Control Centre to be broadcasted through the police communication channel to all the police personnel on duty for action.

[6] At about 3.15am 23 June 2003, Luqman's father – Mahayuddin b. Salleh (SP5) received the telephone call from SP4 informing him of the burning car and Luqman's condition. Together with his other son – Imran (SP11), SP5 rushed to the scene of the incident where the Fire Department Personnel were trying to put out the fire of the burning car. From the scene, SP5 and SP11 rushed to the Emergency ward of the Malacca Hospital where they met Luqman. Luqman informed SP5 that he was robbed at the traffic light Semabok and that thereafter he was taken to Bukit Lintang. From the Emergency ward, Luqman was admitted into the Intensive Care Unit (ICU) of the Hospital. SP11 accompanied Luqman. On the way to the ICU Luqman who was still able to talk, informed SP11 that he had been robbed. According to SP11:

> Abang saya beritahu bahawa dia disamun dan seterusnya orang itu masuk ke dalam kereta. Orang itu suruh abang saya bawa kereta ke Bukit Katil. Lepas itu, orang itu bawa kereta tersebut ke satu kawasan di Melaka. Kemudian, orang itu bawa abang saya ke Bukit Lintang, lalu dia dibakar.

Luqman also informed SP11 he indentified MAV 7993 as the number of the motorcycle involved. SP11 wrote the number in his telephone book (P10A).

[7] The police, who had managed to obtain particulars of the owner of the motorcycle no. MAV 7993, was hot on the trail of the suspect. On 24 June 2003 at about 2.50am Chief Inspector Izzuddin Runggai (SP15) arrested Sahak b. Ujang (SP13), the owner of that motorcycle. Following up on the information obtained from SP13 as to who actually was using that motorcycle, at about 3.15am on the same date, SP15 proceeded to an unnumbered house at Batu 9 1/4, Kg. Umbai, Merlimau of Malacca and arrested SP3. SP15 recovered motorcycle MAV 7993 from the said house. From there SP15 rushed to a house at Tiang 34, Batu 9 1/4, Kg. Umbai Malacca where at about 3.30am, he arrested Nomezam.

[8] On 27 July 2003 at about 9am, Luqman succumbed to his injuries. At about 12pm on the same date the Forensic Pathologist at the Malacca Hospital, Dr. Mohamad Azaini Ibrahim (SP1) performed a post mortem on Luqman's body. SP1 found that there were extensive burn injuries covering approximately 50% of the surface of Luqman's body. These burn injuries were mostly first degree burns with reddening and swelling of the skin and were seen on the forehead and face, the upper part of the front of the neck and over both shoulders and the upper part of the back. The right side of the chest, both lower limbs (front and back) and the back of the hands also showed first degree burn injuries. Smaller areas of second degree burns were noted over the upper back. Some blisters with red margins were seen by SP1 proximal to the left wrist. SP1 found that there was redding of the epiglottis and the pharyngeal mucosa. SP1 also noted some reddening of the tracheal and bronchial mucosa. Foci of necrosis and ulceration were also noted in the mucosa. SP1 certified the cause of Luqman's death as severe burns. SP1 was of the opinion that the 50% extensive burns on Luqman were sufficient in the ordinary course of nature to cause the death.

[9] On 1 July 2003, Nomezam made a confession to Elesabet Paya Wan (SP16) – a magistrate at the Malacca Magistrate's Court who recorded it as P26.

[10] At the close of the prosecution's case the learned trial judge found that the prosecution had proved a *prima facie* case of murder against Nomezam, and called upon him to enter on his defence. Nomezam gave evidence on oath. He called no other witness.

The Defence Case

[11] The substance of Nomezam's evidence is as follows. Sometimes in June 2003 at about 9.30pm he met SP3 by chance at Kg. Sri Minyak, Malacca. On the invitation of SP3 he followed SP3 to Malacca town to have a dinner of rice with masak asam pedas. They went on SP3's motorcycle. At about 12 midnight they arrived at the asam pedas shop where they had their dinner. After dinner they went for a ride around the Malacca taxi stand. From there they proceeded back to Umbai. Nomezam said on the way he saw Farah – his girlfriend (SP2) alighting from a car. When SP3 saw the driver come out of the car with SP2, SP3 told Nomezam to frighten the driver of the car. Nomezam said SP3 wanted to frighten the driver because SP3 knew that SP2 was his (Nomezam's) girlfriend. When the car moved, Nomezam and SP3 immediately followed it on the motorcycle which was ridden by SP3 with Nomezam as the pillion rider. When the car stopped at the traffic light junction near the Al-Azim Mosque, SP3 told Nomezam to get into the car to frighten the driver. SP3 also told him to wait near Azam Motor. As directed by SP3, Nomezam entered the car and told the driver to drive on. The driver asked Nomezam, "kenapa". Nomezam said, "Nak tahu jalan dulu". The driver drove the car with Nomezam directing the way to Azam Motor. At Azam Motor, they waited for SP3 to arrive on the motorcycle. While waiting for SP3, Nomezam asked the driver, "kenal itu perempuan". The driver said, "kenal". Nomezam said, "ok lah". That was the only conversation between them. Then SP3 arrived. SP3 said to the driver, "Berani keluar dengan Farah". The driver said he was Farah's friend. On hearing that SP3 said to the driver, "tahu nasib kau". After that SP3 told Nomezam and the driver to go to Tiang Dua. From Azam Motor, with Nomezam in the car, the driver drove the car followed by SP3 on the motorcycle. Reaching a rubber estate, at Tiang Dua, SP3 told Nomezam to come out of the car. SP3 told Nomezam to frighten the driver. The driver was Luqman. When Nomezam asked SP3 "nak takutkan macam mana?", SP3 took out a bottle and showed

it to Nomezam. SP3 told Nomezam that that was petrol and that he wanted to pour it on the car. Nomezam told SP3, "Tak payah". SP3 said, "Tak apa, kita takut sahaja". SP3 then splashed the petrol inside and outside the car. According to Nomezam, at that time he was about 15 feet away smoking a cigarette. Then SP3 lighted a piece of paper and threw it onto the roof of the car setting it ablaze. Nomezam asked SP3, "Kenapa bakar kereta?". SP3 said he thought that there was no petrol on the roof of the car. Then, Nomezam and SP3 left the scene on the motorcycle. On the way SP3 told Nomezam not to make a fuss, "jangan bising-bising".

Nomezam's Submission

[12] Before us the thrust of the submission by the learned counsel for Nomezam is as follows. Two persons were present at the time of the commission of the act which was alleged to have eventually caused the death of Luqman – Nomezam and SP3. SP3 was the sole eyewitness who claimed that he witnessed what Nomezam did to Luqman on that fateful day. Although he conceded that there was nothing in the grounds of judgment of the learned trial judge to indicate that he had used Nomezam's confession (P26) to find Nomezam guilty of the murder charge, learned counsel contended that the learned trial judge must have used P26 to corroborate SP3's evidence. This, according to the learned counsel was because there was no other evidence to corroborate SP3's evidence. In respect of P26, learned counsel pointed out that the Learned Magistrate who recorded the confession failed to make a memorandum at the end of P26 which was a mandatory requirement under s. 115(3) of the Criminal Procedure Code (CPC) rendering P26 inadmissible in evidence. Learned counsel argued that without the confession the prosecution had no leg to stand on as all that the court had before it was only SP3's evidence against that of Nomezam's. Learned counsel contended that there was no independent evidence to prove that Nomezam was more guilty that SP3. In this connection learned counsel submitted that SP3 was an accomplice and that there was no evidence to corroborate his testimony. According to the learned counsel, Nomezam's conviction was therefore not safe.

A

Decision

[13] P26 was admitted in evidence by the learned trial judge after conducting a lengthy trial-within-trial. A separate grounds of judgment for the trial-within-trial was written by the learned trial
B judge (see p. 598 Jilid II to p. 635, Jilid III of the appeal record). The answer to the question whether a piece of evidence was taken into account or not by the learned trial judge could only be arrived at by examining the judgment of the learned judge as well as the notes of the proceeding. However, we found nothing in the
C judgment of the learned trial judge on the whole case ("the main judgment") as well as the notes of proceeding to show that he had taken into account P26 in arriving at his decision that Nomezam was guilty of the murder charge. Indeed he made no reference at all to P26 in the main judgment. Therefore we are
D unable to agree with the learned counsel's submission that the learned trial judge must have used the confession in arriving at his eventual decision in this case. More will be said later about P26 when we deal with the implication of the absence of the memorandum required under s. 115(3) of the CPC at the end of
E P26. We now turn to what we think is the larger and more important issue raised by the submission advanced on behalf of Nomezam – whether without P26 the decision of the learned trial judge in convicting Nomezam of the murder charge can be upheld. This depends on the question whether without P26, the
F prosecution has proven beyond reasonable doubt the murder charge against Nomezam.

[14] Without P26 the prosecution's case rests substantially on the evidence of SP3. As we have said, before us and indeed in the
G court below, relying on *Harcharan Singh & Anor v. PP* [2005] 1 CLJ 11 CA, learned counsel for Nomezam contended that SP3 was an accomplice. But was he? For reasons which we will explain in a moment we hold that he was not. He was also not an accessory after the fact. An accomplice is a person who
H participates in the commission of the crime charged (see Harcharan Singh, *Re Soo Leot* [1955] 1 LNS 127; *Kuan Ted Fatt v. PP* [1985] 1 CLJ 150; [1985] CLJ (Rep) 174, *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241). In *Harcharan Singh*, it was argued on behalf of the
I accused that PW9 was an accomplice. This court found that there

was no evidence to suggest that PW9 had ever participated in the first and the second accused's act of pulling the rope around the deceased's neck. However, this court found that PW9 was a witness to the final moment of the first and the second accused's attack on the deceased and that he assisted them in disposing of the deceased's body and did not inform anyone of whatever he had seen and the assistance he had rendered. This court held that he was therefore an accessory after the fact. In his judgment, speaking for this court, Augustine Paul JCA (as he then was) said at p. 20:

> Strictly speaking an accessory after the fact cannot be an accomplice as he is not concerned in the commission of the original offence. In *Kuan Ted Fatt v. PP* [1985] 1 CLJ 150; [1985] CLJ (Rep) 174 the Federal Court did not treat a witness who was present at the time of the commission of the offence as an accomplice as he had no prior knowledge that the offender intended to commit the offence charged. However, it can be safely stated that the question of whether an accessory after the fact is an accomplice is academic as his evidence must be considered on the same principles as that of an accomplice. Where he has played an active role his evidence must be corroborated. On the other hand if his role has been passive his evidence may be accepted with the usual corroboration warning.
>
> What remains to be considered is whether the role played by PW9 requires his evidence to be corroborated. He helped to loosen the rope around the deceased's neck. He helped to carry the body of the deceased to the boot of the car. When the car was driven off he sat as a passenger in the front seat. When the car later stopped PW9 and the second accused carried the deceased's body and dumped it. After that he did not mention what he knew to anyone. It is clear that the role played by PW9 is not passive. He was an active accessory after the fact. Where a witness plays such an active role his evidence is no better than that of an accomplice (see *Alimuddin v. R* 23 C 361). A similar view has been expressed in the case of a witness who admits that he is cognisant of the crime to which he testifies and took no steps to prevent or disclose it (see *R v. Chando* 24 WR Cr 55; *Bihari v. State* AIR [1957] Or 260). The need to treat PW9's evidence with caution is made stronger by the fact that he said that he was not charged as he had agreed to become a witness for the prosecution. In support we refer to cases such as *Amar v. R* AIR [1931] L 406 and *Indar v. R* AIR [1931] L 408 where it was held that the testimony of a person who has thrown to

A the wolves his erstwhile associates and friends in order to save his own skin must be received with great caution. In the circumstances it was our view that the evidence of PW9 requires to be corroborated.

B **[15]** In *Harcharan Singh*, this court found that PW9's evidence showed that he helped to loosen the rope around the deceased's neck. This happened after the first accused pulled one end of the rope and the second accused pulled the other end of the rope which was earlier on tied around the deceased's neck. Later, PW9 assisted both the accused to carry the deceased's body to the C boot of the car. When the car was driven off by the first accused, PW9 sat as a passenger in the front seat. When the car stopped, PW9 and the second accused carried the deceased's body from the boot and then dumped it. This court also found that apart from not mentioning to anyone about whatever that he had seen D and done as well as the assistance he rendered to both the accused, PW9 also admitted that he was not charged because he had agreed to testify for the prosecution. So, it was in the light of the evidence as aforesaid that this court held PW9 to be an accessory after the fact.

E

[16] The facts in *Harcharan Singh* and the facts in the instant appeal are poles apart. In this appeal, although SP3 was with Nomezam from the time they followed the car driven by Luqman to the final moment when Nomezam set Luqman on fire, SP3 had F no prior knowledge that Nomezam intended to commit the offence charged. There was nothing to show that SP3 had prior knowledge that Nomezam would stop the motorcycle, jump from it and then enter the car when it stopped at the traffic light junction at Jalan Tun Fatimah. Thereafter, as was the case from G the beginning when they met and set out from the Umbai Esso Petrol Station, it was Nomezam who was in command of the situation. It was Nomezam who dictated where to go and what SP3 was supposed to do that day. SP3 played no active role in the act of Nomezam tying Luqman's hands with a scarf and later H tying them to the steering wheel of the car. SP3 played no active role when Nomezam poured petrol on Luqman's body and setting Luqman on fire. As for the petrol which Nomezam had asked him to buy, SP3 explained that he thought it was meant for the motorcycle. We have not lost sight of learned counsel's plea to us I to take into account that SP3 did not lodge a police report or complain to anybody. Learned counsel contended that if SP3 was blameless, why did he not do anything after that incident? On this

issue of what SP3 did or did not do, we find that he was grilled extensively under cross-examination. He was questioned as to why he did nothing to stop Nomezam from pouring the petrol on Luqman's body. SP3's reply was that Nomezam had a sickle. When asked again in the later part of his cross-examination, SP3 said "saya takut dan tidak menghalang Nomezam kerana Nomezam ada sebilah sabit". When asked why did he not lodge a police report after the incident, SP3 said Nomezam warned him not to tell anybody. Later still, SP3 was questioned as to why he did not run away when he was alone on the motorcycle and SP3 replied that Nomezam had a sickle. The relevant part of SP3's cross-examination containing that last question and the answer to it as well as the questions and answers that followed is reproduced below:

S : Mengapa kamu tidak melarikan diri semasa kamu berseorangan di atas motosikal kamu?

J : Nomezam ada sebilah sabit.

S : Nomezam ada dalam kereta dan kamu atas motosikal?

J : Kalau saya lari, Nomezam akan bunuh saya.

S : Macam mana Nomezam boleh bunuh kamu?

J : Nanti dia mencari saya juga.

S : Mengapa kamu tidak laporkan kepada polis?

J : Nomezam yang beritahu saya jangan beritahu kepada sesiapa.

That exchange in cross-examination reveals the reason which explains why SP3 did not take the actions queried – fear of deadly reprisal, which in our view was not unreasonable deterrence in the circumstances. That fear appears to have sufficiently cowed SP3 into being tight-lipped at least until he was surprised and picked up by SP15 and his arresting team in the early hours of 24 June 2003. It is tempting to say that it would have been better for SP3 to lodge a police report or inform somebody about what he had seen at the first available opportunity. One is also tempted to say that it would have been very much better if SP3 had snatched away the bottle of petrol from Nomezam's hand or done something to stop the latter from

A setting Luqman on fire, or at the very least run away from the scene. It is easy to say in retrospect that SP3 should have done this and that, or that he should not have done this and that, and the list of the actions that he should or should not have taken can be very long indeed. But then there is no set rule of natural
B reaction. This was clearly explained in the *State of Uttar Pradesh v. Devendra Singh*, AIR [2004] Supreme Court 3690 at p. 3692:

> Human behaviour varies from person to person. Different people behave and react differently in different situations. Human
C behaviour depends upon the facts and circumstances of each given case. How a person would react and behave in a particular situation can never be predicted. Every person who witnesses a serious crime reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away
D to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Some may remain tight-lipped overawed either on account of the antecedents of the assailant or threats given by him. Each one reacts in his special way even in similar circumstances, leave alone, the varying nature depending
E upon variety of circumstances. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

F **[17]** Having scrutinized the evidence of SP3 we are of the view that the learned judge did not err when he held that SP3 was not an accomplice or accessory after the facts, and that his evidence was to be treated as that of an ordinary witness requiring no corroboration. Nevertheless, despite his ruling that SP3's evidence
G required no corroboration, the learned tried judge held alternatively, that there was sufficient corroboration of SP3's evidence. We agree with him. The corroborating evidence must confirm SP3's evidence in at least one material particular which is directly relevant to the issues in this case in that it tends to
H suggest not only that the offence charged had been committed but also that it had been committed by Nomezam. Such corroborating evidence may be direct or circumstantial (see *Thavanathan Balasubramaniam v. PP* [1997] 3 CLJ 150, at 173-176). The nature of the corroborating evidence will necessarily vary according
I to the particular circumstances of the offence charged. (See *R v. Baskerville* [1916] 2 KB 658 at p. 667).

[18] As a starting point, SP3's evidence that from SP2's house, Nomezam followed Luqman's car on the motorcycle ridden by him with SP3 as pillion rider is corroborated by SP2's evidence. SP2 testified that at about 12.50am, as she was about to enter her house (after alighting from Luqman's car), she saw Nomezam who was riding a Kriss motorcycle with a pillion rider, following Luqman's car.

[19] The more important evidence which corroborates SP3's evidence is provided by SP11. SP11 testified that he accompanied Luqman when the latter was transferred from the Emergency Ward to the ICU of the Malacca Hospital. According to SP11, on the way to the ICU, Luqman told him that he had been robbed and the person entered the car. That person told him to drive the car to Bukit Katil. Then that person drove the car to an area in Malacca. Later still, that person drove him to Bukit Lintang, where he was set ablaze:

> Abang saya beritahu bahawa dia disamun dan seterusnya orang itu masuk ke dalam kereta. Orang itu suruh abang saya bawa kereta ke Bukit Katil. Lepas itu, orang itu bawa kereta tersebut ke satu kawasan di Melaka. Kemudian, orang itu bawa abang saya ke Bukit Lintang, lalu dia dibakar.

According to SP11, Luqman also informed him that the number of the motorcycle involved was MAV 7993. A few minutes later Luqman lost his consciousness. SP11's evidence on what Luqman told him was corroborated by SP11's police report (P11) which was lodged on 29 June 2003.

[20] The aforesaid statement by Luqman to SP11 was admitted in evidence by the learned trial judge (and in our view rightly) as a dying declaration under s. 32(1)(a) of the Evidence Act 1950 which provides:

> **Statements, written or verbal, of relevant facts made by a person who is dead** or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the court unreasonable, **are themselves relevant facts in the following cases:**
>
> (a) **when the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death,** in cases in which the cause of that person's death comes into question.

A **Such a statement is relevant whether the person who made it was or was not at the time when it was made under expectation of death,** and whatever may be the nature of the proceeding in which the cause of his death comes into question.

B **[21]** In our view that statement by Luqman substantially corroborates SP3's evidence in the following manner:

(a) According to SP3's evidence, when Luqman's car stopped at the traffic light junction at Jalan Tun Fatimah near the C stadium, Nomezam stopped the motorcycle, jumped from it and armed with a sickle entered the car and slid into the front passenger's seat next to Luqman who was then driving the car. In his statement to SP11, Luqman did not say where he was stopped, but his statement that **he had been robbed** D **and the person entered the car (... dia disamun dan seterusnya orang itu masuk ke dalam kereta)** does support SP3's evidence that Nomezam **entered** Luqman's car which they had been tailing when it stopped;

E (b) SP3's evidence from the point after Nomezam entered Luqman's car until Nomezam set Luqman on fire is obviously lengthy and having more details when compared to Luqman's brief dying declaration. Nonetheless, Luqman's statement corroborates the core of SP3's evidence as to what happened F after Nomezam entered the car. As would be recalled, as directed by Nomezam SP3 **followed the car to Bukit Katil** B.P Petrol Station where Nomezam gave him RM5 to buy petrol. Thereafter, the car was driven to Semabok Esso Petrol Station and then to Jalan Bukit Katil/Duyong where it stopped G and Nomezam ordered Luqman to move to the front passenger seat of the car after tying the latter's hands using a scarf. From there Nomezam drove the car to Bukit Katil B.P Station where, as ordered by Nomezam, SP3 got into the car and sat behind the front passenger's seat. Then Nomezam H drove the car to Mata Kuching Shell Station and then back to Bukit Katil B.P Station where SP3's motorcycle was left earlier. From there, Nomezam drove the car along different routes until eventually he stopped the car at the scene at Bukit Lintang where he set Luqman on fire. The very core of I SP3's evidence which we have just recounted is this. After Nomezam entered Luqman's car, the car proceeded to Bukit

Katil. The car then was driven to a number of places (some of which were the same places) before it was taken over by Nomezam who drove it to Bukit Katil B.P Petrol Station and from where Nomezam drove the car to the scene at Jalan Bukit Lintang and thereafter set Luqman alight. In our judgment, that very core of SP3's evidence which captures the more important events that occurred during what must have been a night of terror for Luqman, is corroborated by Luqman's statement that that person told him to drive the car to Bukit Katil. Later, that person drove the car to an area in Malacca. Later still, that person drove him to Bukit Lintang, where he was set ablaze (orang itu suruh abang saya bawa kereta ke Bukit Katil. Lepas itu, orang itu bawa kereta tersebut ke satu kawasan di Melaka, kemudian orang itu bawa abang saya ke Bukit Lintang, lalu dibakar);

(c) SP3's evidence that it was Nomezam who entered the car and later took control of it and then drove it to Bukit Katil B.P Station and eventually to the Bukit Lintang where Nomezam set Luqman on fire was also corroborated by Luqman's dying declaration. It is true that in his statement Luqman did not mention any name, and that after saying that he was robbed, Luqman said that person (orang itu) told him to drive the car to Bukit Katil. Luqman then continued to use the term 'orang itu'. Luqman said that person (orang itu) drove the car to an area in Malacca, and later still drove him to Bukit Lintang where he was set ablaze. Other than 'orang itu', Luqman did not refer to any other person at all. In our view, there is no doubt that that person (orang itu) who drove Luqman to Bukit Lintang and eventually setting him on fire must be Nomezam. This is so as Nomezam was the person who entered the car, told Luqman to drive to Bukit Katil and later drove him to an area in Malacca. According to SP3's evidence, it was Nomezam who entered Luqman's car when it stopped at the traffic light junction at Jalan Tun Fatimah.

[22] Another item of corroborating evidence is motive. Although motive is not a necessary ingredient to be established in the offence of murder, it would if shown, tend to support the case against the accused so charged (See *Dato' Mokhtar Hashim & Anor. v. Public Prosecutor* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101, *Perimal v. State* [1986] Cr. LJ 220, 227, *Omwasi v. Mahendran Singh* AIR [1998] SC 249). Here it is jealousy. Jealousy of an ex-

A boyfriend who felt that he was jilted. Jealousy is a powerful motive. SP2's evidence reveals that Nomezam was SP2's ex-boyfriend. They became acquainted in early February 2003. Their relationship was short-lived because SP2's parents did not approve it. Sometimes between April and May 2003 it came to an end. On
B 22 June 2003 at about 9pm, while she was at home, SP2 received a telephone call from Nomezam. In an angry tone, Nomezam asked SP2 why she changed, "kenapa awak berubah. Saya dah lama sabar dengan awak. Saya dah macam orang gila cari awak. Jangan buat dia jadi kurang ajar. Dia memang suka orang buat dia
C jadi kurang ajar. Ubahlah peel itu, kalau boleh lupa, lupakan". Nomezam then ended the monologue abruptly. It is not difficult to detect Nomezam's anger and exasperation and even threat in that telephone call. He could not accept the fact that his relationship with SP2 had ended. The pain of a broken heart
D appeared to be too much for him to bear. To add insult to his 'injury', some three hours later, Nomezam witnessed SP2 being dropped off at her house by another man driving a car. That man was Luqman – SP2's special boy friend after Nomezam. So, unknown to Luqman when he drove off from SP2's home, he was
E stalked by an angry and jealous ex lover (of SP2) who was still nursing the pain of a broken heart!

[23] Thus, the evidence of motive which we have alluded to also lends credence to SP3's evidence against Nomezam.

F

[24] In our judgment, the evidence which we have just discussed confirms SP3's evidence in that it tends to suggest not only that a murder had been committed, but also that it had been committed by Nomezam. The learned trial judge was right when
G he concluded that there was sufficient corroboration of SP3's evidence.

[25] That however, is not the end of the matter, for, in the alternative, the learned trial judge went on to consider SP3's evidence on the basis that he was an accomplice and on the
H premise that there was no independent corroboration of his evidence. The learned trial judge said in such a situation he was aware of and did warn himself of the danger of acting on the uncorroborated evidence of SP3. Nevertheless, having made a

I

maximum evaluation of SP3's evidence, he was prepared to act on it as he was convinced of SP3's credibility and the truth of his evidence. This is what he said in his judgment:

> [77] However, in the event that I have also erred in this alternative finding, I am acutely aware of and do hereby warn myself of the danger of acting on the uncorroborated evidence of SP3. In this regard, I have given SP3's evidence my utmost consideration and am convinced of his credibility and the truth of his evidence which has undergone incisive cross-examination. There is no reason for him to tell lies in court. I am unable to find any plausible ground to reject his evidence.
>
> [78] In *Bhojraj v. Sita Ram* AIR [1936] PC 60, the Privy Council advised that the real tests for either accepting or rejecting evidence are how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case.
>
> [79] The inherent probability or improbability of a fact is the prime consideration in testing the credibility of a witness: per Ong Hock Thye F.J. in *Muniandy & Ors v. PP* [1966] 1 LNS 110, 258 left column.
>
> [80] In relation to the instant appeal, I am of the view that notwithstanding the incisive cross-examination for three days, it is my specific finding that SP3's evidence has remained unscathed and is consistent with all the exhibits tendered through various prosecution witnesses as well as their evidence. His evidence is certainly not a figment of his own imagination.

So, although the danger of convicting on uncorroborated evidence of SP2 (on the footing that he was an accomplice) was clearly in the learned trial judge's mind, he nevertheless believed SP3's evidence. We are of view that he was entitled to act on it. We will not interfere with the conviction based on it unless we find that the verdict is unreasonable or cannot be supported. Having subjected SP3's evidence to careful scrutiny we do not think that the decision of the learned trial judge was unreasonable or cannot be supported.

[26] We turn to the elements of the offence of murder. On the evidence before the court there is no doubt and indeed it was not disputed that the death of Luqman had been proven by the prosecution. The first element of the offence is thus established.

A Of the second element as to who caused Luqman's death, on the strength of SP3's evidence and/or without the corroborating evidence, there is no doubt in our mind that it was Nomezam. We hold that the learned trial judge was right when he found as a fact that it was Nomezam who poured the petrol on Luqman and used
B a burning newspaper to set the latter on fire thereby causing the extensive burn injuries, which in turn caused his death. The third element is the proof of the necessary *mens rea* to establish the offence of murder. In this regard, SP1 who performed a post mortem on Luqman's body found that there was extensive burn
C injuries covering approximately 50% of the surface of Luqman's body. These burn injuries were mostly first degree burns with reddening and swelling of the skin and were seen on the forehead and face, the upper part of the front of the neck and over both shoulders and the upper part of the back. The right side of the
D chest, both lower limbs (front and back) and the back of the hands also showed first degree burn injuries. Smaller areas of second degree burns were noted over the upper back. Some blisters with red margins were seen by SP1 proximal to the left wrist. SP1 found that there was redding of the epiglottis and the
E pharyngeal mucosa. SP1 also noted some reddening of the tracheal and bronchial mucosa. Foci of necrosis and ulceration were also noted in the mucosa. SP1 certified the cause of Luqman's death as severe burns. SP1 was of the opinion that the 50% extensive burns on Luqman were sufficient in the ordinary
F course of nature to cause the death. In the light of this evidence we have no hesitation in concluding that the learned trial judge was right in finding that Nomezam's acts which caused Luqman's death were done with the intention of causing bodily injury to Luqman and that the bodily injury intended was sufficient in the
G ordinary course of nature to cause death. Thus, all the requisite elements of the offence of murder were proven by the prosecution.

[27] We hold that on the evidence which we have alluded to
H thus far (without P26) and for reasons which we have explained, the learned trial judge was right when he held that the prosecution had proven a *prima facie* case of murder against Nomezam as charged. This takes us back to P26.

I **[28]** As we have said elsewhere in this judgment, the learned trial judge had not used P26 in finding Nomezam guilty of the charge. But this does not mean we cannot on appeal re-evaluate all the evidence in support of or against P26, and consider whether the

learned trial judge's finding in admitting P26 in evidence was correct. That we can do so is clear from A*hmad Najib Aris v. PP* [2009] 2 CLJ 800 (per Zulkefli Makinuddin FCJ delivering the judgment of the Federal Court at pp. 818-819).

[29] P26 was recorded by SP16 under s. 115 of the CPC, which (before being deleted by Act A 1274 effective from 7 September 2007) provided as follows:

> (1) Any Magistrate may record any statement or confession made to him at any time before the commencement of the inquiry or trial.
>
> (2) Such statement or confession shall be recorded in full in writing by the Magistrate to whom it is made and shall then be forwarded to the Magistrate, it different, before whom the case is to be inquired into or tried.
>
> (3) No Magistrate shall record any such statement or confession unless upon questioning the person making it he has reason to believe that it was made voluntarily, and when he records any confession he shall make a memorandum at the foot of such record to the following effect:
>
> *I believe that this confession was voluntarily made. It was taken in my presence and hearing and was read over to the person making it and admitted by him to be correct and it contains a full and true account of what he said.*
>
> (Signed) AB
> Magistrate.
>
> (4) The taking and recording of any statement or confession shall not disqualify a Magistrate who has so taken and recorded the same from inquiring into or trying the case.
>
> (5) No oath or affirmation shall be administered to any person making a statement or confession as in this section provided.

[30] As would be recalled, in respect of P26, learned counsel contended that SP16 who recorded P26 failed to make a memorandum at the end of it, and that since the making of the memorandum was a mandatory requirement under s. 115 (3) of the CPC, P26 was inadmissible in evidence. For reasons which we will set out in a moment, we are unable to agree with the learned counsel's submission.

[31] Similar argument was raised in *Mohamed Isa bin Leman v. PP* [1938] 1 LNS 41. The court of Criminal Appeal opined that the omission to append the memorandum under s. 115(3) of the CPC could be cured under s. 420 of the CPC by calling the Magistrate who recorded the confession to prove that he believed that the confession was voluntarily made. This is what Roger Hall CJ said in delivering the judgment of the court:

> *But there is another objection to the admissibility of this confession and that is that there is not appended to it the memorandum directed by Section 115 (iii) of the Criminal Procedure Code.*
>
> After recording the accused's statement the magistrate added Read over to accused in Malay who acknowledges it to be correct and he has no more to add.
>
> *When taking the confession at the Rest House the magistrate presumably had not access to books or instructions and so overlooked the form of the memorandum. The magistrate could have been called at the trial to prove that he believed the confession was voluntarily made. This is provided for by Section 420 of the Code …*
>
> *… We think that the magistrate not having been called to supply the deficiency the confession should have been excluded.* (emphasis added).

[32] Similar opinion was also expressed subsequently in the Court of Appeal's case of *PP v. Raman I, Raman II, Ayappan* [1939] 1 LNS 74; [1940] 9 MLJ (FMSR) 163 (per Poyser CJ at p. 168 and Mc Elwaine, CJ (SS) at p. 170).

[33] We revert to the case before us. Unlike in *Mohamed Isa b. Leman (supra)*, where the learned Magistrate who recorded the confession was not called by the prosecution to prove that he believed the confession was voluntarily made (*in lieu* of his omission to record at the end of the confession, the memorandum required under s. 115(3) of the CPC), in the instant appeal, SP16, the learned Magistrate who recorded P26 gave evidence that she was satisfied that Nomezam had made the confession voluntarily. The learned trial judge was satisfied after holding a trial within trial that the prosecution had proved beyond reasonable doubt that the confession was made by Nomezam voluntarily, without any inducement threat or promise. The question before us is whether the learned trial judge was right in arriving at that conclusion?

What is meant by voluntary was explained by the Federal Court in *Dato' Mokhtar Hashim & Anor. v. Public Prosecutor* [1983] 2 CLJ 10; [1983] CLJ (Rep) 101, at p. 110:

> It appears from the decision in *Ping Lin (ante)* that the classic test of the admissibility of an accused's confession that the prosecution must establish beyond reasonable doubt that *it was voluntary, in the sense that it was not obtained from him either by fear or prejudice or hope of advantage created by a person in authority, or by oppression,* should be applied in a manner which is part objective, part subjective.

[34] To prove the confession, the prosecution called SP16, Kpl Anuar b. Ibrahim (TW2), the Malay Interpreter, Rohana bt. Ahmad (TW3), L/Kpl 98092 Roslan b. Mohamed (TW4), the investigation officer, ASP Azman b. Abd. Razak (TW5) and the rebuttal witness – Chief Inspector Mohd Izzuddin b. Runggai (PW6R).

[35] According to ASP Azman's evidence, on 25 June 2003 at about 9.30am Nomezam indicated his intention to make a confession (membuat pengakuan). Upon hearing that, ASP Azman suggested to Nomezam to make the confession before a Magistrate. Nomezam agreed with the suggestion. ASP Azman told Nomezam that for this purpose he would make the necessary arrangement for Nomezam to see the Magistrate which arrangement ASP Azman eventually made which enabled Nomezam to see SP16 on 1 July 2003. Upon being questioned why Nomezam was brought before SP16 only on 1 July 2003 when he expressed his intention to confess on 25 June 2003, ASP Azman explained that he wanted to give Nomezam the opportunity to think very carefully about his intention to make the confession:

> Saya mahu tertuduh fikir panjang-panjang dan betul-betul tentang hasratnya itu untuk membuat pernyataan di hadapan Magistrate sebagai yang saya cadangkan. Saya di waktu itu mahu memberi peluang kepada tertuduh sebelum membuat sesuatu tindakan.

[36] According to SP16, at about 12pm 1 July 2003, ASP Azman inform her that an accused person wanted to make a confession. At about 3.20pm on that day, Nomezam was brought to her chamber by Kpl Anuar (TW2). After asking TW2 to remove the handcuffs from Nomezam' hands, SP16 told TW2 to leave, thus leaving Nomezam, SP16 and the court interpreter (TW3) in the chamber. After TW2 left her chamber, SP16 started her enquires.

SP16 asked Nomezam whether he wanted a male officer to take his confession. Nomezam said that it did not make any difference to him and that any officer could take the confession: "Saya tidak kisah mana-mana pegawai boleh ambil". SP16 then asked Nomezam whether he wanted a male interpreter. Nomezam said that he did not care (dia tidak kisah). SP16 then made physical examination of Nomezam's body. SP16 asked Nomezam to take off his shirt and SP16 also asked Nomezam to lift the legs of the jeans he was wearing. SP16 did not find any mark of injuries on Nomezam's face or body. SP16 next asked Nomezam about the condition in the lock-up and the food that he was given as well as how the police had treated him. Nomezam's reply was as follows:

> Telah masuk lokap lebih kurang 1 minggu lepas. Masuk tidak silap hari Selasa minggu lepas. **Di lokap ada dapat makan dan minum yang cukup. Layanan polis baik. Polis tidak ada naik tangan.**

SP16 then asked Nomezam whether he knew the reason why he was brought to court. Nomezam said he did. He wanted to make a confession because he actually did it ("saya tahu. Saya ingin buat pengakuan kerana memang saya buat").

SP16 next asked Nomezam whether he wanted to make the confession because of any threat, inducement or promise. In this regard, in her evidence SP16 said, "Ditanya sama ada saspek ingin buat pengakuan kerana ada yang paksa, suruh, ugut dan janji untuk buat pengakuan. Jawapan saspek: Tidak ada sesiapa yang paksa, suruh, ugut datang mahkamah untuk mengaku polis tidak ada janji bahawa jika mengaku akan dapat hukuman ringan. Tidak ada sesiapa yang gertak atau ugut supaya saya mengaku".

SP16 enquired about the reason why Nomezam wanted to confession. Nomezam's answer was:

> **Saya memang telah buat perkara tersebut. Saya mengaku sendirilah saya memang buat, dah terlepas.**

SP16 then explained to Nomezam the risk he was taking in deciding to confess and the consequence of the confession including the most extreme penalty that would await him if the confession were admitted and he were convicted. In her evidence SP16 said:

J : Risiko saya menerangkan bahawa keterangan Tertuduh itu boleh digunakan di mahkamah. Untuk pilihan saya menerangkan kepada Tertuduh bahawa Tertuduh boleh mencari peguam untuk menentang atau melawan tuduhan terhadap beliau dan untuk sebab akibat pengakuan, saya menerangkan kepada Tertuduh jika pengakuan diterima dan Tertuduh disabit salah, hukuman yang diperuntukkan undang-undang ialah hukuman mati.

S : Selepas itu, apakah jawapannya?

J : Jawapan Tertuduh ialah *"saya telah buat perkara tersebut. Saya tetap ingin mengaku walaupun anda telah terangkan kepada saya pilihan untuk tidak mengaku atau melawan kes ini"*.

Continuing her evidence, SP16 testified that after undertaking the enquiry as aforesaid, she was satisfied then Nomezam wanted to make the confession voluntarily. She then went on to record the confession duly made by Nomezam in a narrative form. SP16 said she spoke in Bahasa Malaysia in which she was fluent. Nomezam spoke to her and made the confession in Bahasa Malaysia. According to SP16, Nomezam had no difficulty in using Bahasa Malaysia. The recording of the confession lasted about 20-30 minutes. After recording the confession SP16 read it over to Nomezam. Nomezam confirmed it and did not wish to make any addition to it. Then Nomezam signed at the end of P26. SP16 also signed at the end of P26 (on the left).

[37] The substance of Nomezam's evidence in challenging the confession is that it was made out of fear of being assaulted by the police (including with a lighted cigarette butt being applied onto his back), and more importantly, P26 was made because of inducement by ASP Azman who promised that he could procure Nomezam's release. In this connection, Nomezam alleged that whenever he was brought to ASP Azman's office, he was given special treatment in the form of nasi lemak with tea, chicken briyani rice with iced tea, cigarettes and television viewing for the purpose of giving the confession, as both Nomezam and ASP Azman were allegedly friends and ASP Azman had allegedly taken advantage of the friendship to obtain the confession. Nomezam also testified that he had been well treated and was given sufficient food and beverage three times, in addition to another drink in the evening.

[38] The allegations of assault, threat, inducement or promise alleged by Nomezam in his evidence had been considered by the learned trial judge in the light of the evidence adduced by the prosecution in the trial within trial. This is clear from his judgment on the trial within a trial (p. 598, vol. 2 of the appeal record to p. 635, vol. 3 of the appeal record, especially at pp. 624 to 635, of vol. 3 of the appeal record). The learned trial judge concluded that having regard to the evidence of SP16, ASP Azman and the rebuttal witness (TW6R) all of whom he accepted as truthful witnesses, made the specific finding that the prosecution had successfully rebutted Nomezam's allegations. Eventually, the learned trial judge found that the prosecution had proved beyond reasonable doubt that the confession in P26 was made by Nomezam voluntarily. It has been held by the Federal Court that the decision as to whether a statement such as a confession is free and voluntary is a question of fact and that question must be decided, like any other question of fact, on evidence. (See *Yaacob v. PP* [1965] 1 LNS 203 at p. 68). Evidence in turn depends on credibility of witnesses called by the prosecution as well as by the defence. Our function as an appellate court when dealing with such question of fact in which questions of credibility are involved, is limited in scope and character, and that in order to reverse the decision of the learned trial judge on the admissibility of P26, we must not merely entertain doubts as to whether his decision was right but be convinced that it was wrong. (See *Dato' Mokhtar Hashim v. PP* at p. 113). Having considered all the evidence on record we are convinced that the learned trial judge was right in admitting P26. In his evidence ASP Azman had denied Nomezam's allegation that he had threatened or induced Nomezam into making a confession by giving the latter special treatment, in the form of special food, drink and cigarettes, and the opportunity to watch television. ASP Azman also denied telling Nomezam to confess and that if the latter confess he would help to secure his release. TWR6 had denied that he had assaulted or threatened Nomezam at any time. He also denied that any police officer had assaulted Nomezam after his arrest. Nomezam's allegation that he was tortured by the application of a lighted cigarette butt on his back would have left a scar of burn injury on his back. However, no such mark was found by SP16 when she examined Nomezam. Indeed she found no tell-tale sign of any injury due to any of the assault alleged by Nomezam. In our judgment, the voluntariness of

Nomezam's confession was fortified by SP16's evidence which revealed Nomezam's own frank replies in response to SP16's very apt and careful questions. Take her question about the condition of the lock-up, the food given to Nomezam and how the police treated him. That question would have provided Nomezam the best opportunity to complain about any assault or threat or the food given to him or the condition of his confinement. Nomezam did not make any such complaint. Instead he said:

> Telah masuk lokap lebih kurang 1 minggu lepas, masuk tidak silap hari Selasa minggu lepas. Di lokap ada dapat makan dan minum yang cukup. **Layanan polis baik. Polis tidak ada naik tangan.**

The statement "polis tidak naik tangan" clearly meant that he was not assaulted. That answer by Nomezam was reinforced by his reply to SP16's question whether he was induced into making the confession by force, threat or promise from any person. Nomezam's reply was clear and unequivocal:

> Tidak ada sesiapa yang paksa, suruh, ugut, datang mahkamah untuk mengaku Polis tidak ada janji bahawa jika mengaku, akan dapat hukuman ringan. Tidak ada siapa yang gertak atau ugut supaya saya mengaku.

It could not be said that Nomezam did not know or was not clear of what was going on because SP16, before that had asked him whether he knew the reason for his being in court that day, and the reply was:

> Saya tahu. Saya ingin buat pengakuan **kerana memang saya buat.**

Then, SP16 asked Nomezam why he wanted to make a confession and the reply was:

> **Saya memang telah buat perkara tersebut. Saya mengaku sendirilah saya memang buat, dah terlepas.**

SP16 then explained to Nomezam the risk he was taking in deciding to confess and the consequences of the confession. SP16 explained to Nomezam that he could get a lawyer to defend himself against the charge. More importantly, she explained to Nomezam that if the confession was accepted and if he were to be convicted the sentence provided by the law would be the death sentence. Nomezam's reply was again clear, steadfast, bold and unmistakable:

Saya telah buat perkara tersebut. Saya tetap ingin mengaku walaupun puan telah terangkan kepada saya pilihan untuk tidak mengaku atau melawan kes ini.

[39] We have considered the phrases "memang saya buat", "saya memang telah buat perkara tersebut. Saya mengaku sendirilah saya memang buat, dah terlepas" and "saya telah buat perkara tersebut" in Nomezam's replies to SP16's questions which we have adverted to. In our judgment, those phrases were used by Nomezam with deliberation and frankness. Those, we venture to say, were voices which appeared to have emanated from deep inside him and not borne out of fear or prejudice or hope of advantage created by any person in authority. We did not detect anything which cast any doubt that the confession was prompted by any threat, or inducement or promise. Indeed, having read and reread those answers given by Nomezam in response to SP16's enquires, we could not help but conclude that the confession (at the time it was made by Nomezam) was the product of his sheer remorse and helplessness over something that he had done which could never be undone! In light of the evidence which we have adverted to and for reasons which we have set out, there is no doubt in our mind that the confession in P26 was given by Nomezam voluntarily.

[40] It is settled law that in this country (unlike in India) once the court is satisfied that the confession is voluntarily made and that it is true, the accused may be convicted solely on the strength of his confession even when retracted (See *Sinaraju v. PP* [1960] 1 LNS 126, *Sathiadas v. PP* [1970] 1 LNS 142, *Yap Sow Keong And Another v. PP* [1947] 1 LNS 121, *Osman & Anor v. PP* [1967] 1 LNS 117, *Juraimi Hussin v. PP* [1998] 2 CLJ 383, *PP lwn. KK* [2007] 6 CLJ 367. In *Juraimi Hussin v. PP* [1998] 2 CLJ 383 at p 409, Gopal Sri Ram HMR (as he then was) speaking for this court said:

> *Lastly, we accept as settled law that once a confession is admitted in evidence an accused may be convicted solely on its strength. However, as a matter of prudence and practice, the court ought to look for corroboration of the incriminating parts of the confession.* See *PP v. Lai Pong Yuen & Ors* [1967] 1 LNS 125; *Public Prosecutor v. Chong Boo See* [1988] 1 CLJ 679; [1988] 2 CLJ (Rep) 206; *Hasibullah bin Mohd Ghazali v. Public Prosecutor* [1993] 3 MLJ 321. *For our part we regard the requirement of corroboration merely as another way of saying that a confession must not only be voluntary but also true.* See

Abu bin Husin v. Public Prosecutor [1959] MLJ 5. For, truth is surely established by the presence of independent evidence that corroborates the incriminating parts of a confession. (emphasis added).

So, the requirement of corroboration stated by this court in the above passage was actually another way of saying that the confession must not only be voluntary but must also be true – the very principle established in *Yap Sow Keong, Sathiadas and Osman v. PP*.

[41] In the case before us, we are satisfied that the confession in P26 was made voluntarily by Nomezam. The full text of Nomezam's confession in P26 is as follows:

Pengakuan:

Saya X kenal lelaki yang saya bunuh itu. Malam itu saya ke Melaka pergi Hang Tuah Mall. Saya duduk H Tuah Mall, pusing dekat Hang Tuah Mall, dlm pukul 1.30 pagi saya balik. Saya ikut Jln Mata Kuching nak balik ke Umbai. Tiba dekat Shell saya namp lelaki tsbt hanta seorg gadis. Saya terus jalan, dia pun jalan. Saya ikut belakang dia. Saya naik motor. Dia naik kereta Proton. Dekat kedai YK, kedai jual barang-barang dekat traffic light saya naik kereta dia. Saya buka pintu kereta dia & terus naik. Lepas itu kami terus ke Semabok. Masuk jln JPJ B Katil bhenti depan kedai motor di B Katil. Nama kedai motor Zam Motor. Saya suruh member saya beli minyak.

Member ini yg datang dgn saya ke H Tuah Mall. Sepanjang masa naik motor dgn saya shggalah saya masuk kereta lelaki itu.

Slps beli minyak kami ke BP yg di hdpn JPJ B/Katil.

Saya parking motor Amran. Amran tu member saya yang seorg lagi. Amran masuk kereta b saya dan lelaki tsbt. Saya terus ikat mangsa dgn tudung. Terus saya ke Kota Mas. Masa itu saya pandu kereta. Saya ke Mata Kuching balik, saya duduk dekat Shell balik dan terus ke Jln Durian Daun. Terus ke YK balik, beli air. Lalu Semabok semula utk ambil motor di BP. Lepas itu pusing balik. Amran tunggang motor.

Kami seterusnya ke Ayer Molek, slps itu ke Bukit Lintang Jln Tiang Dua. Nak tiba Tiang Dua saya pandu kereta ke tepi. Saya ikat dia dekat stering dan buang minyak dlm kereta dia dan terus saya bakar. Saya gunakan lighter dgn kertas. Slps itu saya dgn Amran terus balik.

A Saya ikat tangan shja dan tidak ikat kaki. Saya ikat dekat stering. Saya belit shja dekat stering.

We find that what was said by Nomezam in P26 was substantially corroborated by SP3's evidence and to a certain extent by SP2's, SP6's and SP11's evidence. We are therefore also satisfied that B the confession was true. In our judgment, the confession together with the other evidence adduced by the prosecution clearly established a *prima facie* case of murder against Nomezam. In our view, this is the additional and alter native ground upon which we C conclude that on the evidence on record, the finding of the trial judge must be upheld.

[42] This brings us to Nomezam's defence. Earlier in this judgment we set out the substance of his defence of the charge against him. It is clear that Nomezam did not deny following and D later entering Luqman's car and telling Luqman to drive on, though did so because SP3 told him to do it to frighten Luqman. Thereafter, it was Nomezam's defence that all that he had done on that day was at the behest of SP3. Nomezam's claimed that SP3 first told him to frighten Luqman when he saw Luqman E dropping off SP2 at her house. In fact Nomezam's defence in shifting his culpability to SP3 began early in his evidence when he said that day at about 9.30pm he met SP3 by coincidence at a retail shop and that it was SP3 who invited him to go to Malacca town to have a dinner of rice with 'masak asam pedas', and that F on the way back he (Nomezam) by chance saw SP2 alighting from Luqman's car. Continuing with his story that SP3 wanted to frighten Luqman, Nomezam said that at the scene SP3 told him to frighten Luqman. When Nomezam asked how, SP3 took out a bottle and showed it to him. SP3 said that it was petrol and that G he (SP3) wanted to pour the petrol on the car. Nomezam testified that when he told SP3 "tak payah", SP3 said "tak apa, kita takut sahaja". Then, SP3 splashed the petrol inside as well as outside the car and set it ablaze. After evaluating the entire evidence of Nomezam and the witnesses for the prosecution, the learned trial H judge found that Nomezam failed to raise any reasonable doubt on the prosecution case. This is what the learned trial judge said in his judgment:

I It is abundantly clear to me that the accused sought to shift his criminal responsibility to SP3. The accused's evidence must be examined in the light of the fact that it was the accused who had first left his friends including SP3 in their "Ting Tong" game at

the material time. The accused had subsequently asked SP3 to follow him on the night in question although SP3 was still enjoying his "Ting tong" game.

SP3 had no emotional attachment or relationship with SP2, the accused's ex-girlfriend, who had become the deceased's girlfriend at the material time. I am unable to see any plausible reason for SP3 to "takutkan dia" (to frighten the deceased), less so for SP3 to react by pouring petrol over the deceased, to set the deceased ablaze in the car, and to cause the death of the deceased.

It was the accused who had an axe to grind against the deceased, as the accused had admitted under cross-examination that he was furious with SP2 for becoming the girlfriend of the deceased. The accused's fury has consequently permeated to the deceased as well.

Apart from shifting his criminal responsibility to SP3, the accused's evidence is a bare denial without any other proof. It has not reasonably dislodged the prosecution's case. A bare denial is not sufficient: see eg, *PP v. Ling Tee Huah* [1980] 1 LNS 212 HC per Yusoff Mohamed J (later SCJ) at p. 326 right column A.

After weighing the entire evidence adduced for both the prosecution and the defence, it is my specific finding that the accused has failed to cast a reasonable doubt on the prosecution's case.

[43] The aforesaid conclusion of the learned trial judge was based on finding of facts which in turn depends on his finding on the credibility of the prosecution's witnesses particularly SP3 on the one hand and of Nomezam on the other. In accordance with settled authorities, this court will be slow to interfere with the findings of the learned trial judge as primary trier of facts. (See *Herchun Singh & Ors v. PP* [1969] 1 LNS 52; [1969] 2 MLJ 209 at p. 211, *Andy Bagindah v. PP* [2000] 3 CLJ 289, *Dato' Mokhtar Hashim v. PP*, *Jamaluddin Md Kassim v. PP* [2010] 5 CLJ 928). In order to reverse the decision on such matters we must, not merely entertain doubt whether his decision was right, but be convinced that it was wrong (See *Dato' Mokhtar Hashim v. PP*, *Jamaluddin Md Kassim v. PP*). We find that the learned trial judge had adequately considered the defence. Having carefully scrutinised the evidence, and having carefully examined the

judgment of the learned trial judge, and for reasons already given, we are satisfied that the learned trial judge was right in finding that the prosecution had proved beyond reasonable doubt a case of murder against Nomezam as charged.

[44] Nomezam's appeal is dismissed. The conviction and sentence imposed on him are affirmed.